LIBRARY
SUPREME COURT, U. S.

No. 365

FILED
JUL 14 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

CHARLES MYRON MOORE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit.

CHARLES E. GRAY,
721 Olive Street,
St. Louis, Missouri 63101,
Counsel for Petitioner.

J. PAUL ALLRED, JR.,
722 Chestnut Street,
St. Louis, Missouri 63101,
Of Counsel.

ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth St., 63101. CEntral 1-4477.

INDEX.

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement of case	4
Reasons for granting the Writ	8
Conclusion	18
Appendix A—Opinion of court below	19
Appendix B—Judgment of court below	28
Appendix C—Conflicting decision of Mann v. United States, 319 F. 2d 404, 407-410 (5th Cir. 1963), cert. denied, 375 U. S. 986 (1964)	29
Appendix D—Conflicting decision of Bloch v. United States, 221 F. 2d 786, 788-789 (9th Cir. 1955)	35

CITATIONS.

Cases:

Berkovitz v. United States, 213 F. 2d 468 (5th Cir. 1954)	8, 9
Bloch v. United States, 221 F. 2d 786 (9th Cir. 1955)	8, 10, 11, 15
Gallagher v. United States, 144 Fed. 87, 88 (1st Cir. 1906)	11
Haner v. United States, 315 F. 2d 792 (5th Cir. 1963)	12
Imholte v. United States, 226 F. 2d 585 (8th Cir. 1955)	7

Mann v. United States, 319 F. 2d 404 (5th Cir. 1963), cert. denied 375 U. S. 986 (1964) ...7, 8, 9, 14
McNabb v. United States, 318 U. S. 332, 341 (1943) 12
Morissette v. United States, 342 U. S. 246 (1952) 10, 11, 12, 13, 14
Sherwin v. United States, 320 F. 2d 137 (9th Cir. 1963), cert. denied 375 U. S. 964, 84 S. Ct. 481, 11 L. Ed. 2d 420 (1964) 7
U. S. v. Atkinson, 297 U. S. 157 15
United States v. Berkley, 288 F. 2d 713, 715 (6th Cir. 1961) 11
United States v. Brown, 348 F. 2d 661, 662 (2nd Cir. 1965) 11
United States v. Carll, 105 U. S. 611 (1882)..... 11
United States v. Ruffino, 67 F. 2d 440 (2nd Cir. 1963) 11, 17
United States v. King, 326 S. 2d 415 (6th Cir. 1964) 11, 16, 17
United States v. Litberg, 175 S. 2d 20, 23 (6) (7th Cir. 1949) 11, 16, 17
Wardlaw v. United States, 203 F. 2d 884 (5th Cir. 1958) 12
Zottarelli v. United States, 20 F. 2d 795, 798 (6th Cir. 1927) 11

Statute and Rule:

18 U. S. C. 472 ..... 3, 4
Federal Rule Criminal Procedure 52 (b)..2, 3, 7, 9, 14

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

CHARLES MYRON MOORE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit.

Charles Myron Moore, Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on April 19, 1967.

CITATIONS TO OPINION BELOW.

The opinion of the United States Court of Appeals for the Eighth Circuit affirming the judgment and sentence of the United States District Court for the Eastern District of Missouri is reported as Moore v. United States, 375 F. 2d 877 (8th Cir. 1967), and is printed in Appendix A.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on April 19, 1967. Petition for Rehearing or in the Alternative for Rehearing En Banc was filed on May 9, 1967 and denied on May 16, 1967. Petitioner's Application for Extension of Time Within Which to File Petition for Writ of Certiorari was filed with this Court on June 7, 1967, and on June 9, 1967 the Court entered its order Extending Time to File Petition for Writ of Certiorari to and including July 15, 1967. The jurisdiction of this Court to review the judgment of the Court of Appeals by Writ of Certiorari is invoked under 28 U. S. C., Section 1254 (1) and Rule 22 (2) of the Revised Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED.

1. Is it plain error within Federal Rule of Criminal Procedure 52 (b) to charge a jury that they may infer defendant had knowledge of the counterfeit nature of currency from the fact defendant intended to pass the currency passed when the law requires such act be done with the specific criminal intent to defraud?

2. Is it plain error within Federal Rule of Criminal Procedure 52 (b) to charge the jury that they may infer specific criminal intent, intent to defraud, from an isolated act where such intent is not inherent in the act itself?

3. Is it plain error within Federal Rule of Criminal Procedure 52 (b) for a charge to create an incriminating judicial presumption which the jury could use as a substitute for proof of the specific criminal intent required by statute?

4. Does a charge which gives the jury a positive misdirection regarding proof of criminal intent unless there

is evidence to the contrary shift the burden of proof to the defendant on the issue of defendant's specific criminal intent and thereby constitute plain error within Federal Rule of Criminal Procedure 52 (b)?

5. Does a charge which creates an incriminating judicial presumption which the jury could use as a substitute for proof of specific criminal intent unless there is evidence to the contrary undermine defendant's presumption of innocence and thereby constitute plain error within Federal Rule of Criminal Procedure 52 (b).

6. Does an appellate court have the power to make a subjective fact determination that the evidence of defendant's guilt is strong so as to remove the plain and prejudicial error from a charge which is admittedly erroneous regarding defendant's sole defense?

7. Is it plain error within Federal Rule of Criminal Procedure 52 (b) to give an admittedly erroneous charge on criminal intent when defendant's request to give a proper charge is refused?

STATUTE AND RULE INVOLVED.

18 U. S. C. 472.

Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeit, or altered obligation or other security of the United States, shall be fined not more than $5,000.00 or imprisoned not more than fifteen years, or both. June 25, 1958, C. 645, 62 Stat. 705.

Federal Rule of Criminal Procedure 52 (b).

Rule 52. Harmless Error and Plain Error.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT OF CASE.

Petitioner was tried and convicted in the United States District Court for the Eastern District of Missouri on all counts of a three count indictment in which each count charged petitioner with passing a Ten Dollar ($10.00) counterfeit bill in violation of Title 18, Section 472, U. S. C. Thereupon defendant was sentenced to five years on each count, said sentences to run concurrently (T. 135).

At the trial petitioner admitted he was the individual involved in the transactions alleged. The sole defense was petitioner's contention that he had not acted with the required and specific criminal intent to defraud because he had not passed the bills in issue with knowledge of the fact that they were counterfeit. A detailed statement of the evidence is not considered to be facts material to the consideration of the questions presented, at least at this time, other than necessary to meet the contention of the Court of Appeals that in their opinion the evidence in the case was strong and convincing in that defendant did not deny passing the counterfeit bills and the pattern used in passing them by one who handled a lot of money, as the defendant admittedly did, amounted to strengthful proof of scienter (Court's opinion, p. 8). These facts can best be presented in the argument amplifying the reasons relied on for the allowance of the Writ.

At the conclusion of the evidence, and consistent with petitioner's sole defense, petitioner requested the court to instruct the jury as follows:

> "You will note that the acts charged in the indictment are alleged to have been done with 'intent to defraud.' In this regard, the court instructs you that the mere act of possessing and passing counterfeit money without knowledge that it is counterfeit does not constitute passing counterfeit money with

the intent to defraud such as to constitute a crime against the laws of the United States. It is the burden of the government to prove beyond a reasonable doubt that the accused knew of the counterfeit character of the United States currency in the denominations of Ten Dollars ($10.00) as mentioned in the evidence before he would be guilty of any crime.

If you are not convinced beyond a reasonable doubt that the accused knew of the counterfeit character of the United States currency mentioned in the evidence, then it will be your sworn duty to find the accused not guilty and acquit the accused" (T. 132).

The court refused to give this instruction (T. 131), but no objection was made to this refusal by trial counsel.

Thereafter without objection by trial counsel, the court charged the jury along the following general lines on the material issue of intent. The jury was told that to establish the offenses charged in each count of the indictment it was necessary it be proved beyond a reasonable doubt that the acts of passing counterfeit obligations of the United States were done with the intent to defraud and the burden was upon the government to prove this element (T. 125-126). It was then charged that it was the position of the defendant that at the time the defendant possessed and passed the counterfeit currency he had done so without knowledge of the fact that the currency was counterfeit and thereby had no intent to defraud. Accordingly the jury was told that if they were not convinced beyond a reasonable doubt that the defendant knew of the counterfeit character of the bills in issue then it would be their sworn duty to acquit the defendant (T. 126). Thereupon, the jury was informed that in a criminal case the matter of intent was an essential element which must exist for the accused to be guilty and before they could find the defendant guilty that the jury must believe that not only

did the defendant do the acts complained of, but must also believe that the acts were intentional and knowingly done by the defendant (T. 126).

The jury was next charged that "knowingly" meant that state of mind where defendant was in possession of facts from which he knew or was aware that he could not do the acts with which he was charged (T. 126-127). The jury was then told that they should note that the acts charged in the indictment were alleged to have been done with the "intent to defraud". This meant to act knowingly and with the specific intent to deceive or cheat for the purpose of causing some loss to another or bring about some financial gain to one's self (T. 127).

Now, the court charged that intent may be proved by circumstantial evidence, that it can rarely be established by any other means, that while the witness may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, there can be no eye-witness account of the state of mind with which the acts charged were done, but what a defendant does or fails to do may indicate intent to commit offense charged (T. 127).

At this point, the court then gave the instruction here questioned and in the following language:

> "It is reasonable to infer that a person ordinarily intends the natural and probable consequences of **acts knowingly done** or knowingly omitted. **So unless the contrary appears from the evidence**, the jury may draw the inference that **the accused intended all the consequences** which one standing in like circumstances and possessing like knowledge should reasonably have expected to result **from any act knowingly done** or knowingly omitted by the accused (T. 127-128)." (Emphasis added.)

Through new counsel, petitioner during the oral argument of his appeal contended that notwithstanding the failure of trial counsel to object to the giving of the objectionable instruction that under the mandate of **Mann v. United States**, 319 F. 2d 404 (5th Cir. 1963), cert. denied 375 U. S. 986 (1964), the giving of the objectionable instruction was plain error affecting substantial rights which the court was required to recognize under Federal Rule of Criminal Procedure 52 (b).

The court below affirmed the judgment of the District Court rejecting Petitioner's contention that the objectionable instruction was plain error. In doing so, the court noted the objectionable instruction and similar instructions had been criticized by that court and other courts, and held to be plain error in **Mann v. United States**, *supra*. However, on the authority of **Imholte v. United States**, 226 F. 2d 585 (8th Cir. 1955), and **Sherwin v. United States**, 320 F. 2d 137 (9th Cir. 1963), cert. denied 375 U. S. 964, 84 S. Ct. 481, 11 L. Ed. 2d 420 (1964), the Court of Appeals held that, while it is better not to give the instruction in a case where intent is not inherent in the act itself, its inclusion in a charge does not constitute prejudicial error where the charge considered as a whole correctly stated the law with sufficient clarity as not to be misleading (Court's opinion, pp. 6-9). The opinion gave no consideration to the contention of counsel that there was a refusal by the court to give an instruction which was proper under the law.

REASONS FOR GRANTING THE WRIT.

1. The decision of the court below in the instant case is directly in conflict with the two decisions of the Fifth Circuit Court of Appeals in **Mann v. United States**, 319 F. 2d 404 (5th Cir. 1963), cert. denied 375 U. S. 986 (1964), and **Berkovitz v. United States**, 213 F. 2d 468 (5th Cir. 1954). Additionally, the decision in the court below is in direct conflict with the decision of the Ninth Circuit Court of Appeals in **Bloch v. United States**, 221 F. 2d 786 (9th Cir. 1955).

The identical language of the objectionable charge in the instant case was utilized by the trial court in **Mann v. United States**, *supra* (See Appendix C). The Court of Appeals held the charge was plain error within the meaning of Federal Rule of Criminal Procedure 52 (b). In doing so, the court rejected the government's contention that when the charge was read as a whole the issue of intent was properly presented to the jury and thereby rendered harmless error. In this regard, the court stated that it was mindful that the objectionable charge would not be error if the charge as a whole fairly gave the law to the jury on the necessity of intent. Accordingly, the court was careful to set out in the footnotes to its opinion the whole of the charge given by the trial court on the issue of intent. Examination of this charge as it appears in Appendix C herein clearly demonstrates that the whole of the charge on the issue of intent in **Mann** was far more complete than in the instant case. Nevertheless, the court held that instructions to the jury must be consistent and not misleading and relied on appropriate authority to hold that the fact one instruction is correct does not cure error in giving another inconsistent instruction.

Moreover, **Mann**, supra, recognizes the real difficulty with the objectionable charge. In this regard, the court

demonstrated that the difficulty with the instruction occurs when the words "**so unless the contrary appears from the evidence**" are introduced into the instruction. The burden of proof was thereupon shifted from the prosecution to the defendant to prove lack of intent. It is demonstrated that if an inference from a fact must be defeated by evidence, then the effect of the instruction is to create a presumption and place the burden on the accused to overcome the presumption.

Mann, further finds vice in the instruction by pointing to the fact that the statute requires a specific criminal intent and that under the instruction involved the jury was invited to speculate as to what any person similarly situated as defendant and with like knowledge could reasonably have expected to be the consequences of the conduct in which he was engaged. Recognizing that the sole defense of defendant was his good faith and lack of criminal intent the Fifth Circuit Court of Appeals thought that such an error affecting such a vital aspect of the case was fundamental error within Federal Rule Criminal Procedure 52 (b), and went to the very essence of the case.

There could be no more direct conflict than in **Mann** and the instant case. While it is true that **Mann** involved an income tax evasion case where the statute requires the element of wilfullness in such case, the semantic difference between "wilfullness" and "intent to defraud" as an element of specific criminal intent is a distinction without a difference.

Berkovitz v. United States, supra, leaves some question as to whether or not there was a proper objection to the objectionable charge, but in the final analysis rejects an incorrect instruction on the question of defendant's good faith by stating that:

"However, the fundamental error is that in a criminal case where the defense, as here, was good faith and absence of criminal intent, what was said had the effect of telling a jury as a matter of law that such proof was sufficient without more to show criminal intent, whereas this was one of the most important phases of the issues of fact that the prosecution was bound to prove beyond a reasonable doubt. The distinction is the difference between facts **tending** to establish guilt and telling the jury they may in effect consider guilt proven thereby. The court undoubtedly may tell them they are entitled to consider the circumstances described in the charge as to tending to prove intent but when it is said that such intent was to be presumed from the facts stated, it necessarily shifted the burden thereafter to the shoulders of the accused to prove his innocence. (Court's emphasis.) 213 F. 2d 468, 476 (5th Cir. 1954).

Moreover, the decision of the Ninth Circuit Court of Appeals in **Bloch v. United States**, 221 F. 2d 876 (9th Cir. 1955), is likewise directly in conflict with the decision of the court below in the instant case. In **Bloch**, the court held it was plain error to charge the jury on the issue of defendant's wilfullness or specific criminal intent in almost the identical language of the charge in the instant case. In the rationale the court demonstrated that the trial court had properly charged the jury that defendant's acts must have been willfully and intentionally done with the intent that the government be defrauded and labeled this a correct statement of the law. The court then noted that the trial court went on to instruct in the language of the objectionable instruction and that this is not a correct statement of the law with regard to a criminal offense wherein a specific intent is an essential element. Relying on the authority of **Morissette v. U. S.**, 342 U. S.

246 (1952), the **Bloch** court demonstrated that the fundamental error in the charge is when the jury is told in effect that they can draw the conclusion that the defendant intended to defraud the government from the mere fact that he filed an incorrect income tax return. In language of the instant case, the error in the objectionable charge is that the jury is told in effect that they may draw the conclusion that the defendant intended to defraud from the mere fact that he passed a counterfeit bill.

In construing the statute and issue in the instant case the courts have uniformly held that the act of passing counterfeit currency, within the language of the statute, must be done **with the intent to defraud** and that the naked act of passing counterfeit money **without knowledge** that it is counterfeit is insufficient to constitute the offense charged in the statute. **United States v. King**, 326 S. 2d 415 (6th Cir. 1964); **United States v. Litberg**, 175 S. 2d 20, 23 (6) (7th Cir. 1949). In other words, a necessary and essential element of the crime is that the defendant had guilty knowledge that the bill or obligation he passes is actually counterfeit. **United States v. Carll**, 105 U. S. 611 (1882); **United States v. Brown**, 348 F. 2d 661, 662 (2nd Cir. 1965); **Zottarelli v. United States**, 20 F. 2d 795, 798 (6th Cir. 1927). And it is the burden of the government to prove such guilty knowledge of defendant beyond a reasonable doubt. **United States v. Berkley**, 288 F. 2d 713, 715 (6th Cir. 1961); **Gallagher v. United States**, 144 Fed. 87, 88 (1st Cir. 1906); **United States v. Ruffino**, 67 F. 2d 440 (2nd Cir. 1963).

Accordingly, **Bloch**, supra, recognizes that the principles are the same in any statute which requires a specific criminal intent and therefore the errors and charges respecting this issue are plain and affect substantial rights of the defendant and the fairness of the trial.

As recognized in all of the above cases, the decision in the court below is in conflict with the principles of

Morissette v. United States, 342 U. S. 246 (1952). In **Morissette**, supra, this Honorable Court clearly establishes the principle that where the intent of the accused is an element of the crime charged, such specific intent is a question of fact which must be submitted to the jury and the trial court may not prejudge the issue by instructing the jury that the law raises a presumption of intent from a single act where such intent is not inherent in the act itself. **Morissette v. United States**, 342 U. S. 246, 273-276 (1952).

These same principles are approved in **Wardlaw v. United States**, 203 F. 2d 884 (5th Cir. 1958) and **Haner v. United States**, 315 F. 2d 792 (5th Cir. 1963), whose principles are again in conflict with the decision of the Eighth Circuit Court of Appeals in the instant case.

2. Clearly, the question is of importance in the administration of criminal justice in federal courts. The Supreme Court holds the prime responsibility for the proper functioning of the Federal Judiciary. **McNabb v. United States**, 318 U. S. 332, 341 (1943). Of late, and properly so, the court has been exercising its jurisdiction to assure defendants they receive basic fundamentals of fairness in state criminal proceedings. Nothing could be more significant in measuring the fundamental fairness of a federal criminal proceeding than assuring a defendant that the trial court will properly conclude whether the case is one of general criminal intent or specific criminal intent. This determination lacks any real complexity and conforms with the statutory protection afforded the defendant who acts in good faith. This statutory protection is a substantial right of the accused and should not be permitted to be destroyed by a singular act of ineptness on the part of his counsel in failing to call the court's attention to such a fundamental issue. Particularly is this true when the defendant has been forthright enough to

admit the act but request the jury to understand that it was innocent in nature. Assuring an accused that the jury will be properly charged on his statutory protection is plainly in the public interest and is so peculiar to every federal criminal proceeding as to not be burdensome to the court to require that the court affirmatively afford the accused this substantial right in its charge.

Conceding the appropriateness in some cases of the conclusion of the Eighth Circuit Court of Appeals in the instant case that "a defendant is entitled to a fair trial but not a perfect trial" (Court's opinion, p. 9), it would appear difficult to apply the label of fairness to any proceeding where the accused's sole defense was undermined by a charge which presumed the accused's intent from an act which he readily admits, but which is not inherently froth with criminal intent. The language of the statute is an admonition to the contrary and necessarily designed to protect citizens who innocently become possessed of counterfeit currency as it moves in the channels of commerce. Moreover, the principles of **Morissette**, supra, and the other authorities herein are too fundamental and substantial to the fair administration of criminal justice in the federal judiciary to be undermined by a technical procedural rule. And these principles are not illusory or unique, but rather are substantial principles present in every federal criminal proceeding.

3. The decision of the court below is respectfully believed to be erroneous and the conflicting authorities herein, both in direct holdings and principles, are so accurate, well founded and needful of approval for the proper administration of criminal justice in the federal judiciary as to dictate the granting of the Writ in the instant case. Some of the basic and fundamental errors in the decision below necessitate comment.

In alluding to the charge as a whole as being such that the court of appeals felt it would be unrealistic for them to assume that the jury was misled, confused or in any manner swayed or influenced by the giving of the objectionable instruction (Court's opinion, p. 9), the Court of Appeals has noted that the trial court clearly and plainly charged the jury on defendant's presumption of innocence, the government's burden of proof, and the necessity of the jury finding and believing the acts were intentionally and knowingly done (Court's opinion, p. 8). All of this overlooks the fact that no other instruction given by the court makes any reference or gives any direction regarding the method or weight which a jury should utilize in evaluating the evidence. Conceding the accurateness of the other instructions alluded to by the Court of Appeals, it is no answer to the questions presented that the jury was properly charged as to what they must find but improperly charged as to how such findings could be made. An accurate direction on the facts to be found does not cure and is inconsistent with a positive misdirection respecting the evaluation of the evidence in arriving at a finding. Even though the trial judge gives an accurate charge on the necessity of intent and the burden of proof, plain error within the meaning of Federal Rule of Criminal Procedure 52 (b) is not cured by an inconsistent and misleading instruction. **Mann v. United States**, 319 F. 2d 404 (5th Cir. 1963), cert. denied 375 U. S. 986 (1964). A trial judge's charge may not prejudge the issue of criminal intent, nor usurp the right of the jury to consider all of the evidence on this vital issue, by charging the jury that the law raises a presumption of intent from a single act where such intent is not inherent in the isolated act. **Morissette v. United States**, 342 U. S. 246 (1952). Incorrect statements of law with regard to a criminal offense, wherein specific intent is an essential element and the sole defense, create ex-

ceptional circumstances, especially in criminal cases, which seriously affect the fairness, integrity and public reputation of judicial proceedings. In the public interest, these are errors which the Supreme Court has said should be noted as substantial though no exception was taken to them. **U. S. v. Atkinson**, 297 U. S. 157; see also **Bloch v. United States**, 221 F. 2d 786 (9th Cir. 1955).

A manifest error in the reasoning of the Court of Appeals is the assertion that the admittedly erroneous charge is not prejudicial where the proof of defendant's guilt was strong (Court's opinion, pp. 7, 9). Such a determination judicially usurps the fact-finding function of our jury system and constitutes a subjective determination of the evaluation the jury would place on the evidence had they been properly charged. This role is far afield from the role of our appellate courts in our system of jurisprudence, that of reviewing questions of law. The evaluation of the weight of evidence is a function vested exclusively within the province of a jury. Unless the utmost protection is afforded to this concept, the meaning of our jury system is seriously undermined.

But even more importantly, in reaching the conclusion that the evidence of the defendant's guilt was strong and convincing, the Court of Appeals has reached for the very acts condemned by the authorities in determining the error of the objectionable charge. In the opinion of the court the evidence was strong and convincing because:

> "**Defendant did not deny passing the counterfeit bills** and the pattern used in passing them by one who handled a lot of money, as defendant admittedly did, amounts to strengthful proof of scienter" (Court's opinion, p. 8). (Emphasis added.)

This subjective evaluation of the evidence is in direct conflict with the cases firmly establishing the principle that the naked act of passing counterfeit currency is not

evidence that defendant knew the bills were counterfeit and thereby passed with intent to defraud. **United States v. King**, 326 F. 2d 415 (6th Cir. 1964); **United States v. Litberg**, 175 F. 2d 20 (7th Cir. 1949).

Additionally, the court has overlooked the evidence in concluding that the counterfeit bills involved bore obvious defects (Court's opinion, p. 4). One victim of the bills certainly noticed no defect when she sent her son out for change for the bill (T. 8-9). Another victim could not tell whether the bill was good or bad (T. 42-43). There were varied opinions concerning the nature of the currency passed at a bar at another time (T. 47). Most importantly, Treasury Agent Stigall was the government's expert witness respecting the counterfeit nature of the bills and testified that a person's ability to recognize or detect the bills as counterfeit would vary with his eye for perceptive detail and his eye for art (T. 43). One can handle large sums of money as defendant admittedly did (Court's opinion, p. 8) without possessing any more of a discriminating eye for detail than the witnesses in the case who handled the bills twice without detection of its spurious qualities (T. 13, 16), or another witness who couldn't tell whether it was marked or what (T. 47), or still another witness who did not become suspicious until she had turned the bill over and examined it closely before placing it in her cash register (T. 33), and yet another witness who couldn't tell whether "the bill was right or not" (T. 42-43).

The court's conclusion that between the time of making the purchases charged and the time of the trial, defendant had changed the color of his hair (Court's opinion, p. 4), overemphasizes the evidence on a fine distinction. Witnesses described the defendant as having blond hair in their description of him. At the time of trial, defendant had "sandy colored" hair (government's memorandum

and brief in opposition to defendant's motion for judgment of acquittal and in the alternative for a new trial, p. 3). Moreover, defendant was not denying the identifications. Further, this fact determination is made without affording defendant's counsel an opportunity to argue to a jury that the acts charged were in October, 1965, and the trial in April, 1966, which raises the question of the effect of the lack of bleaching qualities of the sun over the winter months on sandy hair compared with its blonde appearance after exposure to the sun throughout the summer before October, 1965. Such distinctions are too fine to permit an appellate court to substitute its judgment for the perogative of the jury.

The court also attaches significance to the fact that in each instance charged defendant passed a bill for small purchases of about one dollar (Court's opinion, p. 4). This subjective evaluation of the evidence by the Court of Appeals was made in the face of the legal principle established in **United States v. Ruffino**, 67 F. 2d 440 (2nd Cir. 1933), that there is no criminal significance to the fact that defendant's purchases were small since such a fact is just as consistent with innocence as guilt.

Additionally, in determining the question of the prejudicial error of the objectionable charge, the court has overlooked the fact that defendant offered a proper instruction which went to the essence of the defense. The Trial Court refused defendant's request to charge the jury that the acts charged had to be done with the intent to defraud and in this regard the mere act of possessing and passing counterfeit money without knowledge that it is counterfeit did not constitute passing counterfeit money with the intent to defraud such as to constitute a crime against the laws of the United States (T. 132). See **United States v. Litberg**, supra; **United States v. King**, supra.

For all of these reasons, and for other reasons that could be amplified in a complete brief, petitioner respectfully submits that this petitioner will be caused to suffer a substantial injustice and the fairness, integrity and public reputation of federal criminal proceedings will be seriously affected unless a Writ of Certiorari issued to review the questions presented.

CONCLUSION.

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

CHARLES E. GRAY,
Counsel for Petitioner.

J. PAUL ALLRED, JR.,
Of Counsel for Petitioner.

July 15, 1967.

APPENDIX.

APPENDIX A.

United States Court of Appeals
For the Eighth Circuit.

No. 18,404.

Charles Myron Moore,
Appellant,
v.
United States of America,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[April 19, 1967.]

Before Blackmun, Mehaffy and Gibson, Circuit Judges.

Mehaffy, Circuit Judge.

Charles Myron Moore, appellant-defendant, was tried to a jury and convicted on three counts of passing counterfeit money with intent to defraud in violation of 18 U. S. C. A. § 472. We affirm.

The sole question raised by appellant's brief is the sufficiency of the evidence to sustain the convictions. Defendant at the conclusion of the Government's evidence moved for a judgment of acquittal. This motion was made orally and counsel concluded by saying "and the Defendant requests permission to submit a written motion to the same effect at the close of all of this case." The court responded as follows: "Permission is so granted to submit a written motion. Ruling will be reserved on this motion." Defendant did not press for a ruling at the time the mo-

tion was made, and from the language used, the court would have been warranted in interpreting the statement as defense counsel's intention to immediately offer evidence on defendant's behalf. This is what he did, but nevertheless on appeal he takes the position that Fed. R. Crim. P. 29 (a) is mandatory in requiring a ruling at this stage of the proceeding; and that failure to then rule forced defendant to adduce evidence which supplied additional incriminating testimony. There is respectable authority, however, holding that there is no prejudicial error in the trial court's reserving ruling on defendant's motion for judgment at the close of the Government's case where evidence at the time the motion was made suffices to present a jury question as to defendant's guilt. *United States v. Godel,* 361 F. 2d 21 (4th Cir. 1966); *Weathers v. United States,* 322 F. 2d 566 (9th Cir. 1963). Additionally, the Second Circuit has recently ruled in *United States v. Rosengarten,* 357 F. 2d 263, 266 (2nd Cir. 1966):

> "It is settled law that a defendant who offers evidence after the denial of a motion for acquittal at the close of the Government's case in chief waives any claim as to the sufficiency of that case considered alone. *United States v. Calderon,* 348 U. S. 160, 164, n. 1, 75 S. Ct. 186, 99 L. Ed. 202 (1954); but see The Motion for Acquittal: a Neglected Safeguard, 70 Yale L. J. 1151 (1961). We have applied this rule when, as here, the judge ignored the command of F. R. Crim P. 29 (a) and reserved decision on such a motion, see *United States v. Goldstein,* 168 F. 2d 666, 669-670 (2 Cir. 1948), and the Supreme Court's approving citation of the *Goldstein* decision in *Calderon,* supra, indicates that it perceives no basis for distinguishing between the two situations, at least in the absence of a demand for a ruling on the motion and explicit refusal by the judge to obey the mandate of the Rule. Quite apart from this, we would consider the Government's case in chief sufficient to support Rosengarten's conviction."

Aside from any waiver question, there could not be any prejudicial error if at the time the motion was made the Government had produced sufficient evidence to justify submission of the case to the jury. We will, therefore, initially summarize only the Government's evidence which standing alone, in our opinion, is sufficient to sustain the jury's findings of guilt.

On the afternoon of October 22, 1965 between 4:30 and 5:30 p. m. defendant entered the Silhouette Lounge and ordered a scotch and water, paying for it with a ten dollar counterfeit bill. Mrs. Ambrose, who with her husband operated the Silhouette, gave defendant change for the bill. After defendant's departure, Mrs. Ambrose, being short of change, sent her fifteen year old son to a nearby supermarket to obtain change for the bill received from the defendant. The clerk at the supermarket refused to change the bill, telling the boy it was counterfeit. The boy then returned the counterfeit bill to his mother.

Defendant was seen to leave the Silhouette Lounge and walk across the street to Maylock's Delicatessen where he purchased a loaf of bread, a quart of milk and a Hostess "twinkie." He paid for these items with a ten dollar bill which he laid on the counter, face up, while Mrs. Maylock sacked the groceries. Mrs. Maylock gave defendant change but as she put the bill in the cash register she noticed it was dark green on the back. She asked another customer to note the direction of the defendant and turned the bill over to her husband for examination.

A week later on the evening of October 29, 1965; some time between 10:00 and 10:30 p. m., defendant entered the Krueger Bar in University City. As the bar was crowded, defendant stood behind the customers sitting on the stools and consumed two drinks of scotch and laid a counterfeit bill on the bar. The bartender put the change on the bar, which defendant retrieved and departed. The bartender

noticed and testified that the bill had "a bad look and it just didn't feel like regular money," and he gave it to a police officer around 11:00 o'clock that night.

A description of the defendant and an arrest order had been put on teletype on the evening of October 22, 1965, but he was not apprehended until the latter part of January, 1966. Between the time of making the purchases with which he was charged and trial date, defendant had changed the color of his hair.

The three counterfeit bills passed by defendant were identical as to serial number, plate number and denomination. In each instance, defendant passed the bills for small purchases of about one dollar. The defects in the bills were evidently obvious, as Mrs. Maylock immediately noticed that the coloring on the bill was bad and both the bartender at the Krueger Bar and the grocery clerk immediately detected the spuriousness of the bills. In addition to this evidence, during cross-examination and in response to defense counsel's question whether defendant was charged with passing any other bills, a secret service agent replied that defendant was associated with but not charged with passing two other bills at the Pancake House and the Valley Farm at about the same time in October.

The District Court must, as do we, in passing on this issue, view the evidence and the reasonable inferences to be drawn therefrom in the light most favorable to the Government. *Coon v. United States,* 360 F. 2d 550 (8th Cir. 1966).[1]

---

[1] Other Eighth Circuit cases to the same effect are *Jacobs v. United States,* 359 F. 2d 960 (8th Cir. 1966); *West v. United States,* 359 F. 2d 50 (8th Cir. 1966); *Coil v. United States,* 343 F. 2d 573 (8th Cir. 1965), cert. denied 382 U. S. 821 (1965); *Lucas v. United States,* 343 F. 2d 1 (8th Cir. 1965), cert. denied, 382 U. S. 862 (1965); *Beatrice Foods Co. v. United States,* 312 F. 2d 29 (8th Cir. 1963), cert. denied, 373 U. S. 904 (1963).

In *Rood v. United States*, 340 F. 2d 506 (8th Cir. 1965), cert. denied, 381 U. S. 906 (1965), this court sustained a conviction for violation of this statute where it was shown that the defendant passed two spurious twenty dollar bills within a period of twenty-four hours. We think the evidence in the instant case is stronger than that in *Rood*. As observed by counsel for defendant, each of such cases must stand on its own peculiar facts. The Government's case clearly presented a jury question as to defendant's guilt. If defendant had insisted on a ruling on his motion at the close of the Government's case, the trial court would have been compelled to reject the motion. It follows that no prejudicial error resulted from the trial court's action in taking the motion under advisement.

We have referred only to the evidence in the Government's case adduced prior to defendant's motion for judgment of acquittal. At trial defendant took the stand and admitted that he handled a lot of cash. He did not deny passing the counterfeit bills for which he was charged, but he did deny knowledge they were counterfeit. Probably the most damaging statement defendant made in testimony was his account of the Pancake House incident. There he was challenged for passing an allegedly spurious bill, whereupon he tore the bill in half and made restitution with a genuine bill. This is hardly the reaction to be expected from one innocent of knowledge that a bill he passed was counterfeit.

Although not raised at the trial below or in briefs, defendant, for the first time, in oral argument urgently contended that the court erred in giving the following instruction:

---

[2] See also and compare *United States v. Carlson*, 359 F. 2d 592 (3rd Cir. 1966); *United States v. Releford*, 352 F. 2d 36 (6th Cir. 1965), cert. denied, 382 U. S. 984 (1966); *United States v. Jonikas*, 187 F. 2d 240 (7th Cir. 1951), cert. denied, 344 U. S. 877 (1952); *Bell v. United States*, 100 F. 2d 474 (5th Cir. 1938).

> "It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused."

Preliminarily, we note defendant failed to comply with Fed. R. Crim. P. 30, requiring an objection to the instruction. Compliance with this rule would have afforded the trial court an opportunity to either omit the instruction or change its language in such a fashion as to make it innocuous. Recognizing this, counsel insists that plain error exists affecting substantial rights which we can recognize under Fed. R. Crim. P. 52 (b).

This and other courts have criticized giving of this or a similar instruction in certain cases. We held in *Imholte v. United States,* 226 F. 2d 585, 591 (8th Cir. 1955), that it is better not to give the instruction in a case where intent is not inherent in the act itself, but its inclusion in a charge does not constitute prejudicial error where ". . . the charge considered as a whole correctly stated the law with sufficient clarity as not to be misleading." *Accord, Sherwin v. United States,* 320 F. 2d 137 (9th Cir. 1963), cert. denied, 375 U. S. 964 (1964).

In *Mann v. United States,* 319 F. 2d 404 (5th Cir. 1963), cert. denied, 375 U. S. 986 (1964), the court held the giving of this instruction was plain error requiring a reversal in an income tax conviction.

In *United States v. Releford,* 352 F. 2d 36 (6th Cir. 1965), cert. denied, 382 U. S. 984 (1966), the court rejected the contention defendant makes here, reasoning that giv-

ing of the instruction was not reversible error where the proof of guilt was strong.[3]

In our opinion, the evidence in this case is strong and convincing. Defendant did not deny passing the counterfeit bills and the pattern used in passing them by one

---

[3] In *United States v. Releford, supra,* note 2, the court stated at page 40:

"The court charged the jury as follows:

"'It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts which he knowingly does or knowingly omits to do. So, unless the contrary appears to you from the evidence, you may draw the inference that Mr. Releford intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act which he knowingly did or knowingly omitted.'

"Relying on the Fifth Circuit's decision in *Mann v. United States,* 319 F. 2d 404, 407 (1963), that such an instruction was erroneous, appellant here charges error in the giving of it. We have had occasion to characterize the language of the involved instruction as clumsy and inartistic but in *United States v. Denton,* 336 F. 2d 785, 788 (C. A. 6, 1964), where the proof of guilt was strong as it is here, we held that the use of it was not reversible error. Speaking for this court Judge Edwards there said:

"'This instruction has been recently and vigorously criticized by the Fifth Circuit, *Mann v. United States,* 319 F. 2d 404 (C. A. 5, 1963), cert. denied 375 U. S. 986, 84 S. Ct. 520, 11 L. Ed. 2d 474 (1964). It has also been held more recently by the Ninth Circuit not to constitute prejudicial error under the whole instruction on intent therein given. *Sherwin v. United States,* 320 F. 2d 137 (C. A. 9, 1963), cert. denied 375 U. S. 964, 84 S. Ct. 481, 11 L. Ed. 2d 420, rehearing denied 376 U. S. 946, 84 S. Ct. 796, 11 L. Ed. 2d 771 (1964). We feel that the second sentence of the instruction quoted above is at best clumsy and, if taken alone, confusing. On this record, however, and under a total instruction on intent very similar to that in the Sherwin case, we do not think the error affected any "substantial right" of defendant.' 336 F. 2d 788.

"We consider that such observations are appropriate and controlling here."

For other cases on the subject see and *cf. Agnew v. United States,* 165 U. S. 36, 53 (1897); *United States v. Barash,* 365 F. 2d 395, 402, 403 (2nd Cir. 1966); *Estes v. United States,* 335 F. 2d 609, 615-617 (5th Cir. 1964), cert. denied, 379 U. S. 964 (1965).

who handled a lot of money, as defendant admittedly did, amounts to strengthful proof of scienter.

The trial court clearly and plainly instructed the jury on defendant's presumption of innocence, the burden resting on the Government to prove defendant's guilt beyond a reasonable doubt, and specifically upon the two essential elements required in this type case, being the act of passing a counterfeit obligation and the doing so with intent to defraud. The court cautioned the jury in addition to defining the element of intent that, in order to find defendant guilty, they must find and believe that his acts were intentionally and knowingly done. Furthermore, the jury was admonished that it was their sworn duty to acquit defendant unless convinced beyond a reasonable doubt that defendant knew of the counterfeit character of the bills.[4]

---

[4] Excerpts from the court's charge:

"Two essential elements are required to be proved beyond a reasonable doubt in order to establish the offenses charged in each count of the indictment:

"First, the act or acts of passing or uttering any counterfeited obligation of the United States, namely, currency in the denomination of ten dollars ($10.00) as charged; and

"Second, doing such act with intent to defraud.

"As stated before, the burden is upon the government to prove beyond a reasonable doubt every essential element of the crime charged.

"It is the position of the defendant that at the time the defendant possessed and passed the counterfeit currency mentioned in the evidence that he did so without knowledge that the currency was counterfeit and thereby had no intent to defraud. Accordingly, if you are not convinced beyond a reasonable doubt that the defendant knew of the counterfeit character of the United States currency mentioned in the evidence, then it will be [your] sworn duty to find the defendant not guilty and acquit the defendant.

"Now, in a criminal case, the matter of intent is, of course, an essential element which must exist, in order for the accused to be criminally liable. Therefore, in order to find this defendant guilty, you must not only believe that he did the acts complained of, and of which he stands charged, but you must also believe that the acts were intentional and knowingly done by the defendant.

Upon consideration of the charge as a whole, it would be unrealistic for us to assume that the jury was misled, confused or in any manner swayed or influenced by the giving of the instruction. Additionally, we are mindful of Fed. R. Crim. P. 52 (a). In discussing this rule in our recent case of *Gresham v. United States,* ... F. 2d ... (8th Cir. No. 18,573, March 30, 1967), Judge Matthes aptly observed:

> "Rule 52 (a), Fed. R. Crim. P., provides that any error which does not affect substantial rights shall be disregarded. The Courts have uniformly held that prejudicial error must be shown before a reversal is justified. (Citations omitted.) The strength of the Government's case is an important factor in determining the existence of prejudicial error. (Citations omitted.)"

As has often been stated, a defendant is entitled to a fair trial but not a perfect trial. We are convinced on the record here that the defendant received a fair trial, free of prejudicial error, and the judgment is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

"'Knowingly' as used in these instructions means that state of mind wherein a defendant was in possession of facts from which he knew, or was aware that he could not legally do or fail to do the acts whereon he here stands charged.

"You will note that the charges in the indictment are alleged to have been done with the 'intent to defraud.' To act with 'intent to defraud' means to act knowingly and with the specific intent to deceive or cheat for the purpose of causing some loss to another or bring about some financial gain to one's self."

APPENDIX B.

Judgment.

United States Court of Appeals
For the Eighth Circuit.

No. 18,404. September Term, 1966.

Charles Myron Moore,
Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Charles Myron Moore, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the District Court.

April 19th, 1967.

Order entered in accordance with Opinion:—

Robert C. Tucker,
Clerk, U. S. Court of Appeals
for the Eighth Circuit.

APPENDIX C.

Conflicting Opinion of Mann v. United States, 319 F. 2d 404, 407-410 (5th Cir. 1963), Cert. denied, 375 U. S. 986 (1964).

A far more complex problem is raised by Dr. Mann's second contention, which relates to the following portion of the Court's oral charge:

> "It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all the consequences which once standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused."

No objection was made to the charge when given; but it is contended that it is so plainly erroneous that this court should notice the error under rule 52 (b), F. R. Crim. P. The Government does not seriously contend that the above quoted portion of the charge, standing alone, is not erroneous. It claims that other portions of the charge rectified any error committed; and when the charge is read as a whole, the issue of wilfulness was fairly presented to the jury. The entire portion of the court's charge relating to wilfulness is printed in the margin.[3]

---

[3] "In every crime there must exist a union of joint operation of fact and intent. The burden is always upon the prosecution to prove both act and intent beyond a reasonable doubt. Specific intent must be proved before there can be a conviction. Specific intent as the term itself suggests, requires more than a mere general intent to engage in certain conduct. A person who knowingly does an act which the law forbids, or knowingly fails to do an act which the law requires, intending with evil motive or bad purpose either to disobey or to disregard the law, may be found to act with specific intent. An act or failure to act is done know-

Dr. Mann argues that the effect of that portion of the charge of which he complains was to make the jury aware of a certain factual hypothesis and to instruct them that if they believed this hypothesis was established by the evidence, they were then authorized, absent opposing evi-

---

ingly if done voluntarily and purposely, and not because of mistake or inadvertence or other innocent reason.

"In considering the defendant's guilt or innocence you are instructed that it must be shown beyond a reasonable doubt that the defendant, Nathan Mann, wilfully and knowingly attempted to evade taxes as charged in Counts One, Two and Three, considering each count separately, with a specific intent to evade such taxes. In our law such specific intent means more than intentional or voluntary filing of a return that may be shown to be incorrect or false, if there were any such returns filed, for it must be shown beyond a reasonable doubt that such filing was accompanied by an evil motive and wrong purpose. Otherwise, you should find him innocent.

"If you find that the defendant, Nathan Mann, acted in good faith in filing one or all of such returns as described in the indictment, you shall find him not guilty as to the one or all of such counts, considering each separately, which were accompanied by such good faith, if any.

"The intent involved in this offense and required to be shown is not proved merely by filing a return that is false, but requires the specific intent on the part of the defendant involving bad purpose and evil motive, and that specific intent must be clearly inferred from the evidence and you must so find from the evidence beyond a reasonable doubt.

"Intent may be proved by circumstantial evidence. It rarely can be established by any other means. While witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, there can be no eye-witness account of the state of mind with which the acts were done or omitted. But what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged.

"It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all of the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.

"In determining the issue as to intent, the jury is entitled to consider any statements made and acts done or omitted by the accused, and all facts and circumstances in evidence which may aid in determining state of mind."

dence, to infer that Dr. Mann's intent was tax evasion. This, he contends, is tantamount to an incriminating presumption which the jury, absent opposing evidence, could use as a substitute for proof. We agree.

In Morissette v. United States, 342 U. S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1952), the defendant, while hunting on a government bombing range, carried away and sold three tons of used bomb casings. He was prosecuted for knowingly converting government property to his own use. The trial court refused to submit the question of wilfulness to the jury, holding that such intent was "presumed" from the defendant's act. In reversing the conviction, the court stated:

> "We think presumptive intent has no place in this case. A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense. A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. In either case, this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime. Such incriminating presumptions are not to be improvised by the judiciary. Even congressional power to facilitate convictions by substituting presumptions for proof is not without limit."

Identical charges, strikingly similar to the charge under consideration in the instant case, were involved in three cases, two of which were decided by this court. Berkovitz v. United States, 5 Cir., 1954, 213 F. 2d 468; Wardlaw v.

United States, 5 Cir., 1953, 203 F. 2d 884; Bloch v. United States, 9 Cir., 1955, 221 F. 2d 786. In all three cases the court charged:

> "The presumption is that a person intends the natural consequences of his acts, and the natural presumption would be if a person consciously, knowingly, or intentionally did not set up his income and thereby the government was cheated or defrauded of taxes, that he intended to defeat the tax."

Convictions in all three cases were reversed on appeal. The opinions held that the effect of the charge was to tell the jury that it could draw the conclusion that the defendant intended to defeat the payment of the tax from the mere fact that an incorrect return was filed; and resulted in a shifting of the burden of proof from the Government to the defendant. As stated in Berkovitz with reference to the charge:

> "It had, of course, told the jury in other parts of the charge that the defendant was presumed to be innocent until proved guilty beyond a reasonable doubt with full elucidation of what this meant. However, the error was in telling them that as a matter of law they could presume criminal intent from the circumstances described in the questioned charge, without at the same time telling them they must consider all the evidence including that offered by defendant to disprove that intent, that the burden of proof never shifted and the Government, in spite of those circumstances, was required to prove the guilt of defendant beyond a reasonable doubt."

[2] The instructions in the instant case go beyond the bounds of the charge set out in the above cited cases. If the charge had ended when the jury was told that a person is presumed to intend the natural consequences of his own acts, when considered in the light of the charge as a

whole, there would have been no error. When the words, "So unless the contrary appears from the evidence" were introduced, the burden of proof was thereupon shifted from the prosecution to the defendant to prove lack of intent. If an inference from a fact or set of facts must be overcome with opposing evidence, then the inference becomes a presumption and places a burden on the accused to overcome that presumption. Such a burden is especially harmful when a person is required to overcome a presumption as to anything subjective, such as intent or wilfulness, and a barrier almost impossible to hurdle results.

[3] The quoted charge is subject to another vice. The statute involved, 26 U. S. C. A., § 7201, specifically provides that the crime of income tax evasion must be accompanied by a specific intent on the part of the accused to defeat or evade the tax, which must be proved by independent evidence. Spies v. United States, 317 U. S. 492, 63 S. Ct. 364, 87 L. Ed. 418 (1943). Under the instruction here involved, the jury is invited to speculate as to what any other person similarly situated to Dr. Mann and with like knowledge, would reasonably have expected to be the consequences of the conduct under consideration as shown by the evidence. The test is whether Dr. Mann himself wilfully attempted to evade or defeat the tax. The following charge was condemned in Chappell v. United States, 9 Cir., 1959, 270 F. 2d 274.

> "Criminal intent is a necessary ingredient of the crime charged in the indictment, and before a verdict of guilty may be rendered you must find from the evidence, beyond a reasonable doubt, that the defendant intended to commit the offense against the United States charged in the indictment. In this connection, you are instructed that every person is presumed to intend the natural consequences of his own voluntary and deliberate acts. One who volun-

> tarily and deliberately performs an act which, from our common experience, is known to produce a particular result, may be presumed to have anticipated and intended that result."

The court held that the quoted charge conflicted with the overriding presumption of innocence with which the accused is endowed under the law.

Our attention is called to the case of Bernstein v. United States, 5 Cir., 1956, 234 F. 2d 475, in which it was said that every charge of a presumption other than that of innocence is not reversible error in a criminal trial. It is not our holding that every charge using the word "presumption" is reversible error. We do hold that it is error to give a charge in a criminal case of this nature, the overall effect of which is to place a burden upon the defendant to produce evidence to overcome a presumption of guilt.

[4, 5] We are not unmindful of the case of Legatos v. United States, 9 Cir., 1955, 222 F. 2d 678, and Windisch v. United States, supra, which hold that when a charge as a whole fairly gives the law to the jury on the necessity of wilfulness in an income tax evasion case, that one isolated part of the charge that a person is presumed to intend the natural consequences of his acts, does not constitute prejudicial error. Even though the trial judge did give an accurate charge on the necessity of intent and the burden of proof, we hold that to leave the jury with that part of the charge complained of in this case was not cured by what was said elsewhere in the charge. Instructions to the jury must be consistent and not misleading. The fact that one instruction is correct does not cure error in giving another inconsistent one. Perez v. United States, 5 Cir., 1961, 297 F. 2d 12.

[6] Counsel for Dr. Mann did not object to the charge as required by Rule 30, F. R. Crim. P. The sole defense

of Dr. Mann was his contention that he did not intend to evade or defeat, the tax imposed; and he denied that his conduct was wilful or that he had any evil motive or intent to defraud. We think that an error affecting such a vital aspect of the case is fundamental. Rule 52 (b), F. R. Crim. P. provides:

> "Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

As stated in Bloch: "The error of the trial court is * * * fundamental and goes to the very essence of the case so we must under the rule take notice of it." As emphasized in Perez, it is never permissible to leave the jury with the idea that it becomes the duty of the defendant to establish his innocence. The charge in this case could very well have had that effect, and as such, we cannot allow the conviction to stand.

For the foregoing reasons, the judgment of conviction on all three counts is reversed and the case is remanded for a new trial.

APPENDIX D.

Conflicting Opinion of Bloch v. United States, 221 F. 2d 786, 788-789 (9th Cir. 1955).

. . . it becomes apparent that the charge was incorrect in several aspects, which will be hereinafter discussed.

[3] The appellant made no objection to the charge as given by the Court, but only objected to the failure of the Court to give his requested instruction, nor did appellant raise in this Court any question regarding the correctness of the trial Court's charge on wilfulness. Whether the objection to the failure to give the offered instruction on wilfulness in the trial Court, and the specification of that failure as error in this court would be

a sufficient saving of the point to permit this Court to consider other non-specified errors in the charge on wilfulness within the rule that Appellate Courts will not consider instructions to which no objections were taken at the time of trial need not be decided because of the provisions of Rule 52 (b) of the Federal Rules of Criminal Procedure, 18 U. S. C. A., and cases decided thereunder. Rule 52 (b) provides:

> "Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

The Supreme Court of the United States in U. S. v. Atkinson, 297 U. S. 157, 56 S. Ct. 391, 392, 80 L. Ed. 555, concerning this matter, said:

> "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings."

See also Morris v. United States, 9 Cir., 156 F. 2d 525, 169 A. L. R. 305; U. S. v. Balodimas, 7 Cir., 177 F. 2d 485; U. S. v. Perplies, 7 Cir., 165 F. 2d 874; Fischer v. U. S., 10 Cir., 212 F. 2d 441, 444.

The error of the trial court is, as we hereinafter point out, fundamental and goes to the very essence of the case so we must under the rule take notice of it.

[4] Proceeding then to a consideration of the Court's charge we find the trial Court instructed the jury in part as follows:

> "The attempt must be wilful, that is, intentionally done with the intent that the government is to be defrauded of the income tax due from the defendant."

That is a correct statement of the law, because the intent involved in the offense with which appellant here was charged is a specific intent involving the bad purpose and evil motive to evade or defeat the payment of his income tax. Wardlaw v. U. S., 5 Cir., 203 F. 2d 884. However, the trial Court went on in his instruction, and in the very next sentence said:

> "The presumption is that a person intends the natural consequences of his acts, and the natural inference would be if a person consciously, knowingly and intentionally did not set up his income, and thereby the government was cheated or defrauded of taxes, that he intended to defeat the tax."

This is not a correct statement of law with regard to a criminal offense wherein specific intent is an essential element. Morissette v. U. S., 342 U. S. 246, 273, 72 S. Ct. 240, 96 L. Ed. 288; Wardlaw v. U. S., supra. As the Supreme Court said in the Morissette case, supra, 342 U. S. at page 275, 72 S. Ct. at page 256:

> "We think presumptive intent has no place in this case. A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense. A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. In either case, this presumption would conflict with the overriding presumption of innocence with which the law endows the accused, and which extends to every element of the crime. Such incriminating presumptions are not to be improvised by the judiciary.

Even congressional power to facilitate convictions by substituting presumptions for proof is not without limit."

The conclusion sought to be supplied by presumption in the Morissette case was one of intent to seal casings, based upon the mere fact the defendant took them. What was said in that case applies equally to the case at bar where under the above portion of the trial Court's charge the jury was told in effect that they could draw the conclusion that the appellant had intended to defeat or evade the payment of his tax from the mere fact that he filed an incorrect income tax return.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 365

CHARLES MYRON MOORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted in the United States District Court for the Eastern District of Missouri on all counts of a three-count indictment, each of which charged the passing of a counterfeit ten dollar bill in violation of 18 U.S.C. 472. He was sentenced to imprisonment for five years on each count, the sentences to run concurrently. The court of appeals affirmed in an opinion (Pet. App. A), reported at 375 F.2d 877, which extensively reviews the evidence.

The sole issue raised is that the judge erred in the following portion of his charge, to which no exception was taken at the trial (R. 127-128):

> It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.

This sentence appears in the section of the charge dealing with the element of "intent to defraud." The judge had previously charged the jury that the defendant (who had taken the stand) claimed that he did not know the currency was counterfeit, and that if the jury were not "convinced beyond a reasonable doubt that the defendant knew of the counterfeit character of the United States currency mentioned in the evidence, it was their sworn duty "to find the defendant not guilty and acquit the defendant" (R. 126). He had also charged that "in order to find this defendant guilty, you must not only believe that he did the acts complained of, and of which he stands charged, but you must also believe that the acts were intentional and knowingly done by the defendant." He defined "knowingly" as meaning that "state of mind wherein a defendant was in possession of facts which he knew, or was aware that he could not legally do or fail to do the acts whereon he here stands charged" (R. 126-127).

The portion of the charge complained of merely told the jury that, if defendant was aware that the money he was passing was counterfeit, it could be inferred that he intended to defraud. Obviously, there is nothing improper about such an inference. Since the jury was expressly told that, if defendant did not know that the money was counterfeit it was their sworn duty to acquit him, there was no error, much less plain error, in the charge.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

AUGUST 1967.

---

[1] Petitioner has misinterpreted the decisions on which he relies. The charge that it may be presumed or inferred that a person intended the natural and probable consequences of acts which he knowingly commits has been questioned in cases where the act is intrinsically ambiguous—as for example failure to file or filing an understated income tax return, which may be attributable to negligence or ignorance rather than a conscious intent to evade. *Mann* v. *United States*, 319 F. 2d 404 (C.A. 5), certiorari denied, 375 U.S. 986; *Berkovitz* v. *United States*, 213 F. 2d 468 (C.A. 5); *Bloch* v. *United States*, 221 F. 2d 786 (C.A. 9). But there is no ambiguity in knowingly passing counterfeit money in purchasing merchandise.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 272062 110